May 29, 2018

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Attention: Mr. Thomas W.R. Ross

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Attention: Mr. Richard Steele/Ms. Susan Fader

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Attention: Ms. Susan B. Barber, Q.C./ Mr. Michael J. Phillips

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Attention: Mr. Greg D. Fingas

Dear Counsel:

Re: LRB File Nos. 004-18, 096-18 & 105-18 – *Construction Workers Union, CLAC Local 151, Applicant v Ledcor Industrial Limited, Respondent; Saskatchewan Building Trades Council, Intervenor; Progressive Contractors Association of Canada, Proposed Intervenor, and Brand Energy Solutions (Canada) Ltd., Proposed Intervenor*.

A. Introduction

[1] On January 3, 2018, the Construction Workers Union, CLAC Local 151 [CLAC], pursuant to section 6-9 of *The Saskatchewan Employment Act*, SS 2013, cS-15.1 [*SEA*], filed with this Board an application seeking to be certified as the exclusive bargaining agent for all employees of Ledcor Industrial Ltd. [Ledcor] in Saskatchewan. The description of the proposed bargaining unit set out in this application – designated as LRB File No. 004-18 – reads as follows:

> *All employees of Ledcor Industrial Limited in Saskatchewan, except the general manager, office manager, office and sales staff and management personnel.*

[2] Subsequent to the filing of this application, the Saskatchewan Building Trades Council [SBTC] applied for standing to intervene and participate in the hearing of this application. A panel of this Board heard SBTC's application on March 13, 2018. Shortly thereafter, on March 26, 2018, in *Saskatchewan Building Trades Council v Construction Workers Union, CLAC Local 151, and Ledcor Industrial Ltd.*, LRB File No. 012-18 [*SBTC*], the Board granted SBTC intervenor status. For context, the Board's Order in that case is reproduced below:

> *If the Board decides that the build-up principle should be considered as one of the factors in its determination of the Certification Application, the Saskatchewan Building Trades Council is granted leave to intervene in order to provide the Board with:*
>
> *(a) Evidence as to the circumstances of the Chinook Power Station currently being constructed by SaskPower in Swift Current, Saskatchewan and the STG/ACC Mechanical & Water Treatment work for Phase 2 of the that project relevant to the application of the build-up principle, as well as the distinction between craft and non-craft bargaining units in the construction industry;*
>
> *(b) Argument as to the proper application of the build-up principle based upon the evidence before the Board; and*
>
> *(c) Any further evidence or argument that the Board shall direct.*

[3] Once the Board's decision became widely known, each of the two (2) proposed intervenors – Progressive Contractors Association of Canada [PCA], and Brand Energy Solutions (Canada) Ltd. [Brand Energy] separately filed an application for intervenor status under Rule 20(3) of *The Saskatchewan Employment (Labour Relations Board) Regulations*, RRS cS-15.1 Reg 1. PCA's application is designated as LRB File No. 096-18, and Brand Energy's application is designated as LRB File No. 105-18.

[4] These two (2) applications came before a panel of this Board comprised of Members Jim Holmes, Allan Parenteau and myself, as Vice-Chairperson, on May 14, 2018. The proposed intervenors were represented by Mr. Thomas Ross. Mr. Richard Steele and Ms. Susan Fader represented CLAC; Ms. Susan Barber, Q.C., and Mr. Michael Phillips represented Ledcor, and Mr. Greg Fingas represented the Intervenor, SBTC.

[5] At the outset of this hearing, Mr. Steele on behalf of all counsel asked the Board to clarify the provisional nature of the Board's Order dated March 26, 2018, *i.e.* would the Board be raising the issue of "build-up", and its' application to the construction industry, generally, during the hearing of CLAC's certification application.

[6] In response to Mr. Steele's request, the Board advised that it was not in a position to state definitively whether the build-up principle would come into play; rather, that was a decision better left to the panel of the Board charged with hearing CLAC's certification application. However, the Board advised all counsel that for the purposes of these two (2) intervener applications, we would assume that the build-up principle would be engaged, and we would decide these intervention applications on that basis.

[7] At the conclusion of the hearing, the Board reserved its decision. The Board further directed that CLAC's certification application should be placed on the June 2018 Motion's Day Agenda to enable the parties to schedule hearing dates for the main application. As Motion's Day is fast approaching, there is need for as expeditious a resolution of these two (2) intervenor applications as possible. The Board determined that in these circumstances, a letter decision is appropriate.

[8] For the reasons set out below, the Board concludes that PCA's application for intervener status should be allowed, and that Brand Energy Solutions application should be dismissed.

B. Nature of the Applications for Intervenor Status

1. PCA's Application

[9] In its application, PCA attests that is was established in 2000. Although it is based in Alberta, it "represents construction and maintenance contractors across Canada, including in Saskatchewan" with a membership of "around 130 organizations". Its members, of which Ledcor is one, "directly employ more than 75,000 employees, and many thousands more in affiliated organizations". See: PCA's Application to Intervene

dated April 10, 2018 [PCA's Application], at paragraph 3. It stipulates further that it "has knowledge and experience in respect to different labour relations models for the construction industry across Canada" and "plays an active role in helping to set legislative policy and jurisprudence for labour relations models in respect to the construction industry". See: PCA's Application, at paragraph 3.

[10] PCA asserts further that is has practical experience respecting the operation of the build-up principle in the construction industry across Canada such that its participation in CLAC's certification application would benefit the Board's deliberations. Furthermore, PCA submits that its experience is broader, and transcends that which Ledcor is able to offer. For example, PAC asserts that it represents both "hiring hall" and "all employee" certified employers. As a consequence, Ledcor would not be in a position to provide as complete a perspective as PCA can.

[11] PCA is seeking status either as a "public interest" intervenor or an "exceptional" intervenor, or both. Counsel for PCA noted that in its earlier Decision, the Board granted SBTC standing on both grounds, and in his submission, the same order should be made in respect of his client's application.

2. Brand Energy's Application

[12] The second proposed intervenor – Brand Energy – is a company based in Alberta but which does work in Saskatchewan. In its application, Brand Energy candidly admits that "the only significant scope of work [it] has this year in Saskatchewan is what is called 'turnaround' maintenance at the Husky Upgrader near Lloydminster". See: Brand Energy's Application dated April 25, 2018 [Brand Energy's Application], at paragraph 2(d).

[13] Brand Energy goes on to explain what "turnaround" maintenance is as follows:

> *Turnaround maintenance involves the full or partial shutdown of an industrial plant so that maintenance can be performed. Given that the owner is usually losing the benefit of production during the turnaround, contractors performing the maintenance typically have to perform the*

> *work very quickly. This in turn means that manpower typically has to grow from no employees to dozens or even hundreds in a very short timeframe, and then wind back down to no employees in a similarly short timeframe. There are contracts who actually specialize in this work.*

See: Brand Energy's Application, *supra*, at paragraph 2(e).

[14] Brand Energy asserts that it, too, should be granted intervenor status either as a "direct interest" intervenor or an "exceptional interest" intervenor or both. It maintains that because it is facing a certification application brought by CLAC in which the United Brotherhood of Carpenters and Joiners of America, Local 1985 propose to raise the "build-up" principle, it has a real and direct interest in the outcome of this matter. Counsel submitted that as such Brand Energy should be permitted to present argument on the "build-up" principle because any decision this Board makes in this case will influence, if not decide, the up-coming certification application.

C. Relevant Statutory Provisions and Legal Principles

1. Relevant Statutory Provisions

[15] The following provisions of *The Saskatchewan Employment (Labour Relations Board) Regulations* are applicable here:

> *20(1) In this section:*
>
> *(a) "application to intervene" means an application in Form 17 (Application to Intervene);*
> *(b) "original application" means an application made to the board pursuant to the Act and these regulations that is the subject of an application to intervene.*
>
> *(2) An employer, other person, union or labour organization that I served with a copy of an application pursuant to section 19 and intends to intervene in the proceedings before the board shall file a reply in Form 18 (Reply).*
>
> *(3) An employer, other person, union or labour organization that is not served with a copy of an application pursuant to section 19 and that intends to intervene in the proceedings before the board shall file an application to intervene.*

[16] The following provisions of the *SEA* are also relevant:

> ***6-103****(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*
>
> *(2) Without limiting the generality of the subsection (1), the board may do all or any of the following:*
>
> *. . . . . .*
>
> *(c) make any orders that are ancillary to the relief requested if the board consider that the orders are necessary or appropriate to attain the purposes of this Act[.]*

2. Relevant Legal Principles

[17] The legal principles relevant to applications for intervenor status before this Board have been announced in a number of its earlier Decisions, many of which were cited to us at the hearing of these applications. These include: *Communication, Energy and Paperworkers Union of Canada v J.V.D. Mill Services*, [2010] SLRBD No. 27, 199 CLRBR (2d) 228 [*J.V.D. Mill Services*]; *Construction Workers Union (CLAC), Local 151 v Tercon Industrial Works Ltd. et al.*, 2012 CanLII 2145 [*Tercon Industrial*]; *Rattray v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Union, Local 9841 et al.*, 2017 CanLII 30194 [*Rattray*], and, of course, *SBTC*, *supra*.

[18] In *J.V.D. Mill Services*, *supra* this Board referred to an article entitled "Interventions in British Columbia: Direct Interest, Public Law & "Exceptional" Intervenors" (2010), 23 CJALP 183 [*Interventions in British Columbia*]. The authors – Sheila M. Tucker and Elin R.S. Sigurdson – attempted in this article to consolidate and rationalize case-law developed in British Columbia respecting intervention applications brought before administrative tribunals and the courts in that jurisdiction. At page 186, Ms. Tucker and Ms. Sigurdson summarized their survey of the authorities as follows:

> *In our opinion, the British Columbia jurisprudence presently recognizes the following bases for intervenor standing:*
>
> *1. The applicant has a direct interest in the answer to the legal question in dispute in that it has legal rights*

> *or obligations that may be directly affected by the answer ("direct interest intervenor");*
> *2. The applicant has a demonstrable interest in the answer to the legal question in dispute in that it has legal rights or obligations that may be affected by the answer, can establish the existence of "special circumstances" and my be of assistance to the court in considering the issues before it ("exceptional intervenor");*
> *3. The applicant has no legal rights or obligations that may be affected by the answer to the legal question in dispute, but can satisfy the court that its perspective is different and its participation may assist the court to considering a public law issue before it ("public law intervenor").*

[19] The Board in *J.V.D. Mills*, *supra*, at paragraph 14 "adopted the[se] three categories of intervenor status as reflective of the categories of status that may be granted".

[20] By definition, an intervenor is a stranger to on-going litigation before an administrative tribunal or a court. As such, allowing such a party to participate in the litigation, especially private litigation, is an unusual, if not an extraordinary, occurrence. It is precisely for this reason that applications to intervene must be carefully scrutinized, and when deciding them this Board should exercise its discretion to grant intervenor standing sparingly, mindful of the particular factual matrix of the case under consideration.

[21] In Saskatchewan, the leading authority respecting various considerations to be taken into account by a court or an administrative tribunal adjudicating an intervenor application remains *R. v. Latimer* (1995), 128 Sask R 195, 1995 CanLII 3921 (SK LRB). There Sherstobitoff J.A. stated at paragraph 6:

> *The textbook, <u>The Conduct of an Appeal</u> by Sopinka and Gelowitz, (Toronto: Butterworths) at p. 187-8 [sic], summarizes the matters usually considered by a court of appeal on such applications:*
>
> > *In considering an application to intervene, appellate courts will consider: (1) whether the intervention will unduly delay the proceedings; (2) possible prejudice to the parties if the intervention is granted; (3) whether the intervention will widen the <u>lis</u> between the parties; (4) the extent to which the position of the intervener is already*

> *represented and protected by one of the parties; and (5) whether the intervention will transform the court into a political arena. As a matter of discretion, the court is not bound by any of these factors in determining an application for intervention but must balance these factors against the convenience, efficiency and social purpose of moving the case forward with only the persons directly involved in the lis. [Footnotes omitted.]*

[22] *Latimer*, *supra*, of course, was decided at time when public interest interventions were far more novel than they are today. Nevertheless, these considerations remain very pertinent, and Saskatchewan courts have transposed them to interventions in other areas of law. See especially: *Saskatchewan Federation of Labour et al v Saskatchewan*, 2010 SKQB 362, at para. 3, and *Saskatchewan (Ministry of the Environment) v Saskatchewan Government Employees Union*, 2016 SKQB 250, referred to by this Board most recently in *Rattray*, *supra*, at paragraph 19.

[23] These, then, are the general principles we will employ when considering these two (2) applications for intervenor status.

D. Analysis and Decision

1. Brand Energy's Application

[24] As noted above, Brand Energy asserts it should be granted standing in this matter either as a "direct interest" intervenor or an "exceptional" intervenor. Applying the relevant considerations outlined above, we conclude that Brand Energy has failed to persuade us that it should be granted intervenor status for the following reasons.

[25] First, while it is true that the build-up principle might also be raised in the certification application brought against Brand Energy, this possibility, in and of itself, is not sufficient to qualify Brand Energy a "direct interest" intervenor. The fact that a proposed intervenor may have a similar case pending before the tribunal or court in question, does not mean it should be granted intervenor status in an unrelated matter. As Sopinka J. stated in *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 SCR 335, at page 340:

> *The discretion, however, will not ordinarily be exercised in favour of an applicant just because the applicant has a similar case. Indeed, it has been held in some courts that this is not a sufficient interest. See: Sokolosky v The Queen, [1978] 1 FC 609, and Re Schofield and Minister of Consumer and Commercial Relations (1980), 28 OR (2d) 764 (C.A.)*

[26] It follows that a proposed "direct interest" intervenor must demonstrate more than simply asserting the decision in one case could be utilized as a precedent in some future case in which it may be involved. Brand Energy provided no further arguments beyond that assertion in support of its contention that it deserved to be granted standing as a "direct interest" intervenor.

[27] Second, and perhaps more significantly, granting Brand Energy intervenor standing would violate one (1) of the cardinal considerations laid down in *Latimer*, *supra*, namely, its intervention "will widen the *lis* between the parties". It is common ground among the parties that the issue which attracted the various intervention applications is confined to the application of the "build-up" principle in the construction industry. However, by its own admission, Brand Energy is not involved in the construction industry *per se*. Rather, its focus is maintenance. While counsel for Brand Energy valiantly argued that "maintenance" is closely related to "construction", and those industries share many similarities, the fact remains they are different industries. To permit Brand Energy to participate in this matter clearly will widen the *lis* between the parties, and on this basis alone, its application for intervenor standing ought to be dismissed.

[28] Accordingly, for these reasons, Brand Energy's Application is dismissed.

2. PCA's Application

[29] As explained earlier, PCA's applies for intervenor standing either as a "public interest" intervenor or an "exceptional" intervenor. For reasons that follow, we conclude that PCA should be granted limited standing as a "public interest" intervenor.

[30] In *Interventions in British Columbia*, *supra*, the authors described "public interest" standing as follows at page 199:

> *This form of standing is granted when a court is satisfied that the participation of the applicant may help the court make a better decision. It is premised on a finding that there is a "public" law aspect to the dispute, giving it significance beyond its immediate parties, and making it a matter on which additional perspectives might well assist.*
>
> *This is sometimes referred to as "public interest" intervenor status, but an applicant may be a public or private interest group, and the viewpoint advanced is not necessarily an expression of what the applicant considers to be in the public's interest. An applicant will generally seek to participate in order to advance a particular agenda (e.g., to ensure the interests of persons with disabilities are considered.) The term "public interest" as it relates to interventions does not describe a qualifying characteristic of an applicant, nor even the applicant's perspective, but rather the effect of the intervention (e.g. it enables the court to make a better decision, so the end result serves the public interest). [Emphasis in original; citations omitted.]*

[31] This description presents a broader concept of who qualifies as a "public interest" intervenor than is found in relevant Supreme Court of Canada jurisprudence. See *e.g.*: *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 238, at 252-3 *per* Cory J., and, more recently, *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524, at paras. 22-23 *per* Cromwell J. However, for good or ill, this Board has endorsed this description, and we utilize it together with the *Latimer* criteria to assess the merits of PCA's application.

[32] Counsel for PCA submitted that should the Board embark upon a consideration of the "build up" principle in this case, it will be a test case. With respect, it is not so apparent to us that this matter should be viewed as a "test" case, as was *Saskatoon Public Library v. Saskatchewan Government Employees' Union et al*, 2016 CanLII 74494 (SK LRB), for example. Indeed, this Board has considered the relevance of the "build up" principle in earlier cases, most recently: *Technical Workforce Inc. and Construction Workers Union (CLAC)*, Local 151, 2016 CanLII 44644 (SK LRB), over-turned on judicial review, 3 CLRBR (3d) 76 (SKQB), so it is more accurate to say this matter is just another in this line of cases. That said, the Board acknowledges that the application of the build-up principle in certification applications involving the construction industry remains a live issue.

[33] In our view, the central inquiry for assessing whether PCA's application should succeed is: can PCA bring a new perspective on the issue under debate, one that cannot be advanced by another party, for example, in this case the Respondent, Ledcor? At the hearing, the Board noted that Ledcor is identified as a member of PCA, and presumably would be in a position to ably represent the position of PCA respecting the application of the build-up principle. Counsel provided little assistance on this question except to say that PCA "was greater than the sum of its parts", and would be able to provide the Board with more expansive submissions drawing upon a broader perspective than could Ledcor.

[34] The Board acknowledges that PCA or more accurately, its member companies, have a legitimate interest in whether and how the build-up principle should operate in the construction industry. This favours granting PCA intervenor status in this matter.

[35] The Board also acknowledges that SBTC has already been granted provisional standing to participate at the hearing of this case. However, just because one party has been recognized as a "public interest" intervenor, this "does not amount to a blanket approval to grant standing to all who wish to litigate an issue". See: *Canadian Council of Churches*, *supra*, at page 252. The Court *per* Cory J. explained that if it were otherwise, "[i]t would be detrimental, if not devastating, to our system of justice and unfair to private litigants". See: *Canadian Council of Churches*, *ibid*.

[36] At the same time, we recognize that in these circumstances "an aura of unfairness" might exist if an intervenor representing the views of an umbrella organization of employers in the construction industry – albeit based in Alberta – were denied the ability to intervene. See: *Reference re Workers' Compensation Act, 1983 (Nfld.)*, *supra*, at page 340.

[37] Accordingly, for these reasons the Board is prepared to grant PCA limited standing to participate in the hearing of this application as a "public interest" intervenor. In the event the build-up principle is engaged at that hearing, PCA will be permitted to file a written submission of not more than 25 pages. The Board reserves to the panel

hearing the matter the right to determine whether it wishes to receive oral submissions from PCA's counsel on the issue.

E. Conclusion and Orders of the Board

[38] For the foregoing reasons, the Board makes the following Orders pursuant to clause 6-103(2)(c) of the *SEA*:

(1) **THAT** the application of Brand Energy – LRB File No. 105-18 – is dismissed;

(2) **THAT** If the Board decides the build-up principle should be considered as one of the factors in its determination of the Certification Application:

(a) PCA is permitted to file a written submission not exceeding 25 pages respecting the application of the build-up principle in the construction industry, and

(b) The right of counsel for PCA to present oral argument to the panel of the Board hearing the Certification Application is reserved to that panel.

(3) **THAT** LRB File No. 004-18 is to be set down on the agenda of the June 2018 Motions' Day for scheduling. This panel is not seized with that matter.

[39] This is a unanimous decision of the Board.

Yours very truly,

Graeme G. Mitchell, Q.C.
Vice-Chairperson